Supreme Court, U.S.
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No. 94-

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

ROBINSON O. EVERETT, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF KATHRINE R. EVERETT, DECEASED, and J. H. FROELICH, JR.

Petitioners,

v.

CONTINENTAL BANK, N.A.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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79

QUESTION PRESENTED

DOES COLLATERAL ESTOPPEL APPLY ONLY WITH RESPECT TO ISSUES ACTUALLY LITIGATED AND ACTUALLY AND NECESSARILY DETERMINED IN ANOTHER JUDICIAL PROCEEDING INVOLVING THE SAME PARTIES?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Robinson O. Everett, Individually and as Executor of Kathrine R. Everett, Deceased, and J. H. Froelich, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit filed on September 15, 1994, with rehearing denied on October 14, 1994.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reproduced in the Appendix (App. p. 1a). The order denying the petition for rehearing and suggestion for rehearing is reproduced in the Appendix (App. p. 6a). The judgment and unpublished memorandum opinion granting defendant-respondents' motion to dismiss are reproduced in the Appendix (App. pp.7a-15a). Related opinions in *Continental Bank, N.A. v. Everett et al*, 964 F2d 701 (7th Cir. 1992), *cert. denied* 113 S.Ct. 816 (1992) [1]

JURISDICTION

Jurisdiction in the District Court was founded upon diversity of citizenship under 28 U.S.C. § 1332. [2] The district court rendered judgment on January 12, 1994, and the petitioners timely filed notice of appeal on February 10, 1994. The judgment of the Court of Appeals for the Fourth Circuit was rendered on September 14, 1994, whereupon petitioners filed a Petition for Rehearing and Suggestion for Rehearing *en banc* on September 28, 1994, which was denied on October 14, 1994. This Petition for

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[1] That opinion of the Seventh Circuit affirmed opinions of the United States District Court for the Northern District of Illinois reported under the same caption in 742 Supp. 508 (personal jurisdiction); 760 F.Supp. 713 (liability), and 768 F.Supp, 246 (damages).

[2] Respondent is a national banking association with its principal place of business in Chicago, Illinois. (See 28 U.S.C. § 1348) Petitioners are citizens of North Carolina. The amount in controversy exceeds $50,000.

a Writ of Certiorari has been brought within ninety (90) days of said denial, as required by Supreme Court Rule 13.1. Review is sought persuant to 28 U.S.C. § 1254(1). This is not a cross-petition and petitioners know of no party who intends to file such a petition.

STATUTES INVOLVED

28 U.S.C. § 1963, which provides:

> A judgment in an action for the recovery of money or property entered in any district court or in the Court of Internationsal Trade may be registered by filing a certified copy of such judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. Such a judgment entered in favor of the United States may be so registered any time after judgment is entered. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

N.C. General Statutes § 1C-1701 through § 1705:

§ 1C-1701. Short title.

> This article shall be known and may be cited as the Uniform Enforcement of Foreign Judgments Act. (1989, c. 747, s.1.)

§ 1C-1702. Definitions.

> As used in this Article. unless the context requires otherwise:

(1) "Foreign Judgment" means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this State, except a "support order," as defined in G.S. 52A-3(14) (The Uniform Reciprocal Enforcement of Support Act) or a "custody decree," as defined in G.S. 50A-2(4) (The Uniform Child Custody Jurisdiction Act).

(2) "Judgment Debtor" means the party against whom a foreign judgment has been rendered.

(3) "Judgment Creditor" means the party in whose favor a foreign judgment has been rendered. (1989, c. 747, s. 1.)

§ 1C-1703. Filing and status of foreign judgments.

(a) A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of this State may be filed in the office of the clerk of superior court of any county of this State in which the judgment debtor resides, or owns real or personal propety. Along with the foreign judgment, the judgment creditor or his attorney shall make and file with the clerk an affidavit which states that the foreign judgment is final and that it is unsatisfied in whole or in part, and which sets forth the amount remaining unpaid on the judgment.

(b) Upon the filing of the foreign judgment and the affidavit, the foreign judgment shall be docketed and indexed in the same manner as a judgment of this State; however, no execution shall issue upon the foreign judgment nor shall any other proceeding be taken for its enforcement until the expiration of 30 days from the date upon which notice of filing is served in accordance with G.S.

§ 1C-1704.

(c) A judgment so filed has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner; provided however, if the judgment debtor files a motion for relief or notice of defense pursuant to G.S. § 1C-1705, enforcement of the foreign judgment is automatically stayed, without security, until the court finally disposes of the matter. (1989, c. 747, s. 1)

§ 1C-1704 Notice of filing; service

(a) Promptly upon the filing of a foreign judgment and affidavit, the judgment creditor shall serve the notice of filing provided for in subsection (b) on the judgment debtor and shall attach thereto a filed-stamped copy of the foreign judgment and affidavit. Service and proof of service of the notice may be made in any manner provided for in Rule 4(j) of the Rules of Civil Procedure.

(b) The notice shall set forth the name and address of the judgment creditor, or his attorney, if any, and of the Clerk's office in which the foreign judgment is filed in this State, and shall state that the judgment attached thereto has been filed in that office, that the judgment debtor has 30 days from the date of receipt of the notice to seek relief from the enforcement of the judgment, and that if the judgment is not satisfied and no such relief is sought within that 30 days, the judgment will be enforced in this State in the same manner as any judgment of this State.

§ 1C-1705. Defenses; procedure.

(a) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed.

(b) If the judgment debtor has filed a motion for relief or notice of defenses then the judgment creditor may move for enforcement of the foreign judgment as a judgment of this State. The judgment creditor's motion shall be heard before a judge of the trial division which would be the proper division for the trial of an action in which the amount in controversy is the same as the amount remaining unpaid on the foreign judgment. The Rules of Civil Procedure (G.S. 1A-1) shall apply. The judgment creditor shall have the burden of proving that the foreign judgment is entitled to full faith and credit. (1989, c. 747, s. 1.)

STATEMENT OF THE CASE

In 1984, Continental Bank loaned $4.2 million to Guilford Telecasters, Inc., a North Carolina corporation. The loan was to be paid in monthly installments over a seven-year period. Petitioners, as well as other stockholders of Guilford, executed guarantees in connection with this loan. The guarantees were in proportion to the stock ownership. Guilford encountered cash flow problems and the guarantors began making monthly payments on the loan. Finally, on December 31, 1986, Guilford filed for reorganization under Chapter 11. Subsequently, in March 1990, Continental sued the

petitioners on their guarantees.[3] On July 22, 1991, this suit which had been filed in the Federal District Court for the Northern District of Illinois, resulted in a summary judgment against the three petitioners on their respective guarantees. The judgment was against Robinson O. Everett for $1,546,548; against Kathrine Everett for $1,546,543; and against Froelich for $561,913. The petitioners gave notice of appeal and proceeded to perfect their appeal to the Seventh Circuit.

Meanwhile, pursuant to 28 U.S.C. § 1963, Continental received permission from the Federal court in Illinois to register its judgment in the Middle and Eastern Districts of North Carolina. Continental then recorded its judgment, not only in the Federal courts in those two districts, but also with the Clerks of three North Carolina counties.[4]

When Continental began collection efforts against the petitioners in the Federal District Court for the Middle District of North Carolina, they filed a motion which, *inter alia,* objected that Continental should not be allowed to enforce its judgment, pursuant to Fed. R. Civ. P. 69, because it had not complied with N.C.G.S. § 1C-1703. That statute requires the filing of an affidavit stating "...that the foreign judgment is final and that it is

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[3] Kathrine R. Everett was still alive when the suit was commenced, but died on January 28, 1992, and her Executor, Robinson O. Everett, was substituted as a defendant in that action.

[4] Durham County where the Everetts resided, Guilford County where Froelich resided, and Wake County where the Everetts owned property.

unsatisfied in whole or in part, and which sets forth the amount remaining unpaid on the judgment". However, Magistrate Judge Eliason rejected petitioners' contention because Continental was "proceeding pursuant to 28 U.S.C. § 1963 which does not require such an affidavit".

Meanwhile, Guilford -- the principal debtor whose debt to Continental had been guaranteed by petitioners -- had obtained approval from the Bankruptcy Court of a reorganization plan. (See *In re Guilford Telecasters,* 128 B.R. 622 (M.D.N.C. 1991). This plan -- crammed down over Continental's objection and described by the bankruptcy judge as "overly generous" to the Bank, *id.* at 127 -- provided that Continental would receive full payment of the balance of its loan at the contract rate over a period of seven years.[5] Fortunately, after consummation of the reorganization plan on July 1, 1991, Guilford -- thanks largely to the efforts of petitioners -- was able to pay off the entire balance of the loan to Continental by December 31, 1991. On January 17, 1992, Guilford obtained an Order in Aid of Consummation, which recited that it had paid all principal and interest owed to Continental -- with the exception of "penalty interest" and collection expenses, for which Continental had made no claim in the reorganization proceedings. Also, the Order directed Continental to assign to another bank the collateral which Guilford had provided for the Continental loan (App. at pp 20a-21a).

Continental's continued enforcement efforts in the Middle District of North Carolina resulted in another

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[5] The plan made no provision for "penalty interest" or collection costs, which Continental had not claimed in the reorganization proceeding.

hearing before Magistrate Judge Eliason. At that hearing the petitioners maintained that, because of the payment by Guilford of all its indebtedness to Continental, there was no ascertained amount then due to the Bank from the guarantors under the judgment that had been entered on July 22, 1991. Magistrate Judge Eliason entered an order on April 28, 1992, which allowed an opportunity for the guarantors to file a motion seeking relief under Fed. R. Civ. P. 60(b) (App. pp 22a- 34a).

On April 22, 1992 -- the same date as the hearing before Magistrate Judge Eliason -- two lawsuits had been filed against Continental in the Middle District of North Carolina. One was filed by Guilford Telecasters, Inc., which sought to recover alleged overpayments collected by Continental and also asked for relief with respect to the Bank's failure to assign the collateral, as ordered by the Bankruptcy Court.[6] The other action was commenced by the petitioners along with another guarantor, James Thrash. In that action, the plaintiffs claim that the Bank had improperly registered in North Carolina the judgment entered against them in the Northern District of Illinois and, thereafter, further defamed their credit by failing to mark the judgment to indicate the debt payments already made.

On May 21, 1992, the Court of Appeals for the Seventh Circuit affirmed the summary judgment that had been entered in the district court *Continental Bank, N.A.*

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In that suit Guilford complained that Continental was still seeking to collect from it even though it had paid the Bank in full. Shortly after this suit was filed, Continental executed the assignment as had been directed by the Bankruptcy Court several months before.

v. Everett, et al., 964 F.2d 701 (7th Cir. 1992) *cert. denied*, 113 S.Ct. 816 (1992). However, because Guilford had already paid the principal and interest, the Court of Appeals observed that "the penalty interest that the Bank has claimed from the guarantors on account of the default in January 1990 ... approximately $75,000, plus the legal fees the bank had incurred pursuing the guarantors, or the remaining stakes". Accordingly, it remanded the case to the District Court to "determine the sum due as attorneys' fees", "fix the amount of penalty interest and enter a single judgment, on which the guarantors will be jointly and severally liable".

Pursuant to Magistrate Judge Eliason's order of April 28, 1992, petitioners had submitted a motion for partial satisfaction under Fed. R. Civ. P. 60(b) in the Northern District of Illinois. On July 9, 1992, District Judge Nordberg denied this motion because it was "premature" for the guarantors to claim partial satisfaction at the same time that the principal debtor, Guilford, was suing Continental to recover alleged overpayments.

Guilford also sought aid from the Bankruptcy Court in its effort to recover the alleged overpayments to Continental; but on August 23, 1992, that court denied relief in light of the earlier bankruptcy proceedings. In turn, the District Court for the Middle District of North Carolina dismissed Guilford's action on the ground that the claim for overpayments had already been denied by the Bankruptcy Court. No appeal was taken from this ruling.

On July 30, 1992, petitioners voluntarily dismissed their suit against Continental pursuant to Fed. R. Civ. P. 41(a); but on October 7, 1992, they filed another complaint against Continental with substantially the same

allegations.[7] In that complaint, the petitioners alleged that Continental had recorded with three North Carolina clerks of court the judgment that it had obtained against them in the Northern District of Illinois; that this had been done by Continental without complying with several requirements of state law, including submission of the affidavit required by G.S. § 1C-1703 and the giving of notice required by G.S. § 1C-1704 and that thereafter, in violation of N.C.G.S. § 1-239. Continental failed to show on the North Carolina judgment dockets the payments received by Continental from Guilford which reduced the amounts due from petitioners under the recorded judgment. According to petitioners, this constituted a tortious abuse of process and defamation of credit.

Claiming res judicata, Continental moved to dismiss; and Senior District Judge Ward granted the motion. With respect to the registration of the Illinois judgment in North Carolina, he stated,

> This same issue was raised by plaintiffs in an action against Continental that was decided by Magistrate Judge Eliason. It is clear that plaintiffs are attempting to relitigate the very issue previously decided by Magistrate Judge Eliason. Therefore, the Court finds that under the doctrine of res

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In its opinion in this case the Court of Appeals for the Fourth Circuit erroneously indicates that the suit was filed by the guarantors after Senior District Judge Ward had dismissed on res judicata grounds the suit filed against Continental by Guilford Telecasters. However, Judge Ward's judgment was not entered until November 20, 1992 -- a month and a half after the complaint was filed.

judicata the decision by Magistrate Judge Eliason, which was affirmed by Judge Bullock, also bars plaintiffs' claim.

Senior Judge Ward also rejected on res judicata grounds the claim by petitioners that Continental should have marked the judgment recorded with the three North Carolina state clerks of court as being partially satisfied. In this instance he observed that:

> ... Judge Nordberg [in the Northern District of Illinois] held that plaintiffs' action to compel Continental to mark the judgments as being partially satisfied was premature and would not be ripe until the North Carolina action to recover themoney already paid by Guilford was concluded. Based on Judge Nordberg's ruling, Continental was under no obligation to mark plaintiffs' North Carolina judgments partially satisfied until Guilford's action to recover money already paid to Continental was resolved.

In its unpublished per curiam opinion affirming the judgment below, the Court of Appeals succinctly sets out Judge Ward's conclusions and then comments: "After our own careful examination of the record, we see no reason to disturb the holding of the District Court in any respect".

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL PREVIOUSLY ANNOUNCED BY THIS COURT.

Despite the morass of facts that must be

penetrated, it soon becomes clear that the decisions of the District Court and the Fourth Circuit in this case conflict directly with this Court's well-established precedent that parties are only collaterally estopped from relitigating issues actually and necessarily decided in a prior judicial proceeding. This principle can be traced back at least a century to this Court's comment in *County Commissioners v. Block*, 99 U.S. 686, 25 L.Ed. 491, 493 (1878): [8]

> The issue tried was a material one, and the judgment could not have been rendered without deciding it. Now that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go farther, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded.

In *Radford v. Myers*, 231 U.S. 725, 730 (1914), in considering the federal question of whether a state court had given proper effect to a federal court judgment, the Court explained that the federal judgment created an estoppel "only as to matters in issue or points controverted and actually decided in that suit". More recently, the Court stated:

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[8] Two years earlier, the Court had discussed res judicata in *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1876).

> Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions *actually and necessarily* decided in a prior suit.

See, Brown v. Friesen, 441 U.S. 127, 139 n.10, 99 S.Ct. 2202, 2213, n.10, 60 L.Ed. 2d. 767 (1979) (emphasis added).

The lower federal courts have followed this guidance from the Court. For example, in *Segal v. American Telephone and Telegraph Co. Inc.*, 606 F..2d 842, 845, n.2 (9th Cir. 1979), the Court of Appeals pointed out that "relitigation of an issue presented and decided in a prior case is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation".

Relying on such precedents, a leading treatise explains that "Issue preclusion [collateral estoppel] attaches only to determinations that were necessary to support the judgment entered in the first action". WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4421 (1981). "Two common explanations are offered to justify this requirement. First, the tribunal that decided the first case may not have been taking sufficient care in determining an issue that did not affect the result, even though the parties vigourly litigated the issue. Second, appellate review may not be available to insure the quality of the initial decision". *Ibid.*

In its Restatement (Second) of Judgments, the American Law Institute has stated the basic principle of

collateral estoppel -- issue preclusion -- in this manner: [9]

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Contrary to this well established precedent, the courts below invoked collateral estoppel with respect to issues that were not actually and necessarily determined in a prior proceeding. Thus, they held that Magistrate Judge Eliason had ruled the recordation of the Illinois judgment in the North Carolina State Court dockets to be proper, even though the language of his orders makes clear that he was dealing only with registration of the judgment in the Middle District of North Carolina pursuant to 28 U.S.C. § 1963. Indeed, he specifically disavowed any intent to determine what North Carolina law required for the recordation of federal judgments with state clerks of court. More important, his consideration of registration of the judgment with a federal court had no bearing on recordation with a North Carolina State court. That recordation was not the subject of 28 U.S.C.

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[9] Restatement (Second) Judgments § 27 (1982). *See also* § 29. The Eleventh Circuit discussed these Restatement provisions in holding that a defendant's conviction of culpable negligence in shooting at police officers as they approached his house did not bar him from bringing a § 1983 action predicated on the unreasonableness of the actions of the officers immediately thereafter. *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1107 (11th Cir. 1992).

§ 1963, but instead was provided for by the Uniform Enforcement of Foreign Judgments Act, 1C- §§ 1701 *et seq.* Not only was the State Court recordation the subject of a different statute promulgated by a different sovereign but also it had different effects than the federal registration and provided different enforcement options for the judgment creditor.

Likewise, District Judge Nordberg's ruling on petitioners' Rule 60(b) Motion -- which, by its own terms, sought relief only with respect to the judgment recorded in the Northern District of Illinois -- had no bearing on the issue of how payments on a judgment should be reflected on the judgment dockets of North Carolina State Courts.[10] Whether or not Judge Nordberg actually decided this issue of what should be reflected on the North Carolina State Court records, it seems perfectly clear that any such decision was not "necessary" for disposition of the Rule 60(b) Motion.

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[10] District Judge Nordberg's ruling on the Rule 60(b) Motion is hard to understand. The Bankruptcy Court had already ruled that Continental had received full payment of its principal and interest -- albeit without penalty interest or attorneys' fees, which it had not claimed in the reorganization proceeding. The suit by Guilford to recover alleged overpayments should have had no bearing on the right of the guarantors to have reflected on the judgments against them the fact that the judgment creditor had received full payment and that, at most, they were liable for "penalty interst" and attorneys' fees to be determined pursuant to the opinion of the Seventh Circuit.

II. THE DECISIONS BELOW PRESENT A QUESTION WHICH MERITS THE COURT'S ATTENTION

Even if the two lower courts flagrantly disregarded established precedent, why should this Court -- with its heavy docket -- concern itself? In the first place, the decisions might be considered such a departure from the "accepted and usual course of judicial proceedings ... as to call for an exercise of the Court's power of supervision" *See* Supreme Court Rule 10. The lower federal courts -- which also have heavy caseloads -- will undoubtedly be tempted to over-extend the doctrines of res judicata and collateral estoppel to dispose of pending cases. In exercising its supervisory power, the Court should be vigilant in preventing them from yielding to this temptation.

Secondly, even though this litigation involves only a money claim for tortious conduct, the rights involved are not inconsequential. Judge Ward's misapplication of collateral estoppel, which was uncorrected by the Fourth Circuit, deprived petitioners not only of their Seventh Amendment right to a jury trial[11] but also of their Fifth Amendment due process right to a hearing on the merits of their claims.[12]

11

Petitioners requested jury trial in their complaint.

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In some instances the unwarranted extension of collateral estoppel maay give an undeserved windfall to a plaintiff who initially has forum-shopped and received a favorable decision which he then applies to later litigation. In other instances, the over-extension of the doctrine in a manner unauthorized by the Court's precedent may

Finally, the question of the effect to be given to the orders entered by Magistrate Judge Eliason in the Middle District of North Carolina and District Judge Nordberg in the Northern District of Illinois is a federal question; and and that federal question "was decided in a way that conflicts with applicable decisions of this Court" extending back well over a century. *See* Supreme Court Rule 10.

Under these circumstances, the significance of the errors committed in this case by the District Court and the Court of Appeals is greater than might appear at first blush. Therefore, the question presented by petitioners should be considered by the Court.

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penalize parties who have relied on that precedent in determining whether to appeal from an adverse decision because other related litigation is still pending.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted.

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January 12, 1995.

APPENDIX

BEST AVAILABLE COPY

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Robinson O. Everett, Individually and as Executor of the Estate of Katherine R. Everett, deceased; J.H. Froelich, Jr., Plaintiffs-Appellants,	
and	No. 94-1250
James Thrash, Plaintiff,	
v.	
Continental Bank, N.A., Defendant-Appellee.	

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
Hiram H. Ward, Senior District Judge.
(CA-92-629)

Argued: July 19, 1994

Decided: September 14, 1994

Before WILKINSON and WILLIAMS, Circuit Judges,
and SHEDD, United States District Judge for the District
of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robinson Oscar Everett, EVERETT & EVERETT, Durham, North Carolina, for the Appellants. Howard J. Roin, MAYER, BROWN & PLATT, Chicago, Illinois, for Appellee. **ON BRIEF**: Kurt Seeber, EVERETT & EVERETT, Durham, North Carolina, for Appellants. Andrew S. Marovitz, MAYER, BROWN & PLATT, Chicago, Illinois; Walter Rand, III, Arthur S. Vreeland, CARRUTHERS & ROTH, P.A., Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The question in this case is whether the plaintiff's claims are barred on res judicata grounds. Because we conclude that the plaintiffs have already had these claims resolved in prior judicial proceedings, we affirm the district the district court's dismissal of plaintiff's suit.

I.

The controversy before us represents the latest round of litigation between the two parties involved. In 1984, Continental Bank loaned $4.2 million to Guilford Telecasters, a North Carolina corporation. The loan was guaranteed by

the plaintiffs in this case, all of whom were principals of Guilford. Guilford defaulted on its obligation in 1986 and filed for bankruptcy. Continental then turned to the guarantors for satisfaction on its loan.

The guarantors, however, did not pay off the entire loan, and Continental brought suit against them in Illinois federal court in March 1990. The Illinois suit resulted in a summary judgment in favor of the Bank for the sum owed. The Bank then sought, and received, permission from the Illinois federal court to register its judgment in the Middle and Eastern sections of North Carolina, where the judgment debtors resided. Although Continental also recorded the judgment with the clerks of the county courts where the guarantors resided, it began collection efforts against the guarantors only in the federal district court for the Middle District of North Carolina.

These efforts were not uncontested. In December 1991, the guarantors filed a motion asking that the North Carolina federal district court refuse to recognize the Bank's judgment. The motion explained that Continental did not properly register its judgment under N.C.G.S. § 1C-1703 which requires a party to file an affidavit demonstrating that its judgment was final. Magistrate Judge Eliason rejected this claim, explaining that Continental was "proceeding pursuant to 28 U.S.C. § 1963 which does not require such an affidavit."

The debtors, however, believed that they had already overpaid on the outstanding debt and continued to resist

Continental's collection efforts.

[1] In April 1992, Guilford brought suit against Continental seeking the recovery of a claimed overpayment on its obligations. At approximately the same time , the parties to this case found themselves back before Magistrate Judge Eliason for additional proceedings on the propriety of allowing Continental to execute its judgment. In his order on the matter, the magistrate again rejected the guarantor's arguments challenging the judgment itself, stating that, "the Court rejects defendants' claim that Continental is not entitled to execution on the judgment because the judgment is not final or because it is otherwise not properly registered." However, because the debtors were continuing to argue that they had already overpaid on their obligation, the magistrate offered the debtors an opportunity to seek Rule 60(b) relief in Illinois federal court.

The Illinois court declined to offer the guarantors any relief. It stated that the guarantors could not "have it both ways" by seeking Rule 60(b) relief on the grounds that the judgment had been satisfied at the same time Guilford was suing Continental in North Carolina federal court to recover funds it had already paid the Bank. The court therefor refused to grant relief until after the conclusion of the North Carolina suit brought by Guilford.

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[1]The loan collection efforts were undoubtedly complicated by the numerous actors involved. At the same time the debtors were resisiting Continental's collections efforts, Continental was embroiled in Guilford's Bankruptcy reorganization proceedings. In September 1991, Guilford paid Continental $1.5 million on its debt and by April 1992 Continental was apparently still owed only $70,000 in default interest on the debt.

That suit ended in November 1992 with a judgment against Guilford. The district court there found that Guilford had received ample opportunity to litigate the issue of how much it owed the Bank during its bankruptcy proceeding, and therefore dismissed the suit on res judicata grounds. No appeal of this decision was initiated, and it is now a final judgment.

The guarantors then filed the instant suit in North Carolina federal district court. The complaint alleged that the Bank abused state debt collection process, committed defamation leading to unfair trade practices, and inflicted emotional distress on the plaintiffs. Specifically, the plaintiffs claimed that the Bank improperly registered the Illinois judgment in North Carolina and defamed their credit by failing to mark the judgment to indicate the debt payments already made. The Bank responded that the claims against it should be dismissed for failure to state a claim and on res judicata grounds.

The district court granted the Bank's motion to dismiss in January 1994. Plaintiffs now appeal.

II.

Plaintiffs contend that the district court erred in dismissing their suit. They argue that they have never had a hearing on the issues presented here. Specifically, plaintiffs contend that the question of whether Continental has harmed them by refusing to follow applicable state law requirements has never been litigated and that no court has ever ruled on that question. According to plaintiffs, these state law violations include failure to file the required affidavits demonstrating that the judgment was final and failure to mark the judgment

to show the payments already made on the outstanding debt. Plaintiffs conclude that the district court's reliance on the principles of res judicata is unfounded.

We cannot agree. The district court carefully analyzed the claims before it as well as the history of the litigation between these two parties, in reaching its judgment. The court first explained that the questions of whether Continental had violated the state law registration requirements had been fully aired before Magistrate Judge Eliason in April 1992. Indeed, as the opinion that resulted from the hearing before Magistrate Eliason indicated, much the same issue had already been litigated in December 1991. Nonetheless, the magistrate's ruling once again addressed plaintiff's concerns on the merits and concluded that Continental's judgemnt was properly registered. On the basis of this ruling, the district court below concluded that "the issue plaintiffs raise has been determined in a proceeding where they had an opportunity for a full and fair hearing." The court therefore barred plaintiffs' claim that Continental had violated law requirements in the process of registering its judgment.

The district court similarly concluded that the Bank did not err in refusing to mark its judgment against the guarantors as partially satisfied. The court explained that this issue had already been carefully examined by the Illinois court in its Rule 60(b) decision. That ruling plainly held that plaintiffs had no right to seek credit on the judgment until after the conclusion of the Guilford suit. Furthermore, the district court here noted that Continental acted entirely appropriately once the Guilford suit did, in fact, become final; the court explained that Continental marked the payments on the judgment against the guarantors in a timely manner. For this reason, the court concluded that the guarantors had no claim

against the Bank on the issue of marking the judgment.

The district court finally decided that the guarantors' unfair trade practices and emotional distress claims were without merit. In addition, the claims were purely derivative of those discussed above. The court held that because the guarantors could not demonstrate that Continental had acted inappropriately in any way, it had no basis for an unfair trade practices or emotional distress claim.

After our own careful examination of the record, we see no reason to disturb the holding of the district court in any respect. Its judgment dismissing plaintiffs' action with prejudice is hereby

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT
No. 94-1250
CA-92-629

FILED OCTOBER 14, 1994

ROBINSON O. EVERETT, Individually and as Executor of the Estate of Katherine R. Everett, deceased; J.H. FROELICH, Jr.

Plaintiffs-Appellants

and

JAMES THRASH

Plaintiff

v.

Continental Bank N.A.

Defendant-Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc was submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc be denied.

For the Court,
/s/ Bert M. Montague.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ROBINSON O. EVERETT, Individually, ROBINSON O. EVERETT, EXECUTOR of the Estate of KATHERINE R. EVERETT, Deceased, J.H. FROELICH, JR., and JAMES THRASH Plaintiffs	
v.	No.1:92CV00629
CONTINENTAL BANK N.A. Defendant	

JUDGMENT

For the reasons set forth in the memorandum opinion entered contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that defendant's Motion to Dismiss be, and the same hereby is GRANTED, that defendant's Motion to Transfer be, and the same hereby is DENIED, that defendant's Motion to Stay be, and the same hereby is DENIED and that this action be DISMISSED with prejudice.

s/s Hiram H. Ward

United Sates District Judge

January 12, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION

ROBINSON O. EVERETT, Individually, ROBINSON O. EVERETT, EXECUTOR of the Estate of KATHERINE R. EVERETT, Deceased, J.H. FROELICH, JR., and JAMES THRASH Plaintiffs	
v.	No.1:92CV00629
CONTINENTAL BANK N.A. Defendant	

MEMORANDUM OPINION AND ORDER

Ward, Senior Judge

This matter comes before the Court on defendant's Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be grated or in the alternative to Transfer and defendant's Motion to Stay. For the reasons stated herein, the Court will grant defendant's motion to dismiss, deny defendant's motion to transfer and deny defendant's motion to stay.

I. FACTS

Plaintiffs are the principals of Guilford Telecasters ("Guilford"), a North Carolina corporation that in 1984 borrowed $4.2 million from defendant, Continental Bank, N.A. ("Continental"). Each of the plaintiffs executed an individual written guaranty of Guilford's debt. All plaintiffs were responsible for the Continental debt in an amount equal to his or her pro rata ownership interest in the corporation.

In 1986, Guilford defaulted on its obligations to Continental and filed for bankruptcy in the United States Bankruptcy Court for the Middle District of North Carolina. Consequently, C ontinental turned to the guarantors for payment of the loan. In 1987, the guarantors began to make timely payments on the debt pursuant to their written guarantees. However, the guarantors later suspended their payments and declined to pay the entire amount due under the terms of the Guilford note. On March 14, 1990, Continental brought an action against the guarantors in the United States District Court for the Northern District of Illinois to recover on the note.

The guarantors challenged personal jurisdiction but the Court held that it had personal jurisdiction. Continental Bank N.A. v. Everett, 742 F.Supp. 508 (N.D. Ill. 1990). On a motion for summary judgment, the Illinois court entered a final judgment against guarantors Robinson and Katherine Everett. Continental Bank N.A. v. Everett, 760 F.Supp. 713 (N.D.Ill. 1991). The United States Court of Appeals for the Seventh Circuit affirmed the judgment on the merits and remanded the case solely for the computation of the amount of default interest and enforcement expenses. Continental

Bank N.A. v. Everett, 964 F.2d 701 (7th Cir. 1992), cert. denied, 113 S. Ct. 816 (1992).

Continental registered the judgment in this district since this is where the plaintiffs' assets are located. Plaintiffs responded by (1) filing objections in both Illinois and North Carolina Federal Courts to the registration of the judgments, (2) filing two motions in the Illinois Federal Court to obtain relief from the judgment under Federal Rule of Civil Procedure 60(b), and (3) filing a lawsuit by Guilford, with guarantor Robinson Everett as its counsel, attempting to recalculate the amount of guaranteed debt to Continental. Plaintiffs lost on all of these actions.

After being unsuccessful on the above actions, plaintiffs filed the current complaint consisting of claims of abuse of process, defamation, along with derivative claims of unfair trade practice, and emotional distress. Continental contends and the court agrees that plaintiffs' claims rest on two central allegations and two associated derivative claims. The first allegation is that Continental's registration in North Carolina of the judgments obtained in Illinois were improper and the second allegation is that Continental defamed plaintiffs' credit by improperly failing to credit the judgments which had been recorded against the plaintiffs with subsequent payments made by Guilford. Continental contends that both allegations have been previously addressed by a court of competent jurisdiction and thus the claims are barred by collateral estoppel and res judicata. In its response, plaintiffs maintain that the allegations in this action were not previously addressed or if they were previously addressed then the prior ruling is not entitled to preclusive effect.

With regard to the derivative claims, Continental

argues in the alternative that the unfair trade practice and intentional infliction of emotional distress should be barred by collateral estoppel and res judicata or be dismissed for failure to allege essential elements. Plaintiffs contend that the claims are not barred and the complaint satisfactorily alleges all of the necessary elements.

II. DISCUSSION

The court agrees with Continental's assertion that the central issues in this matter are (1) whether Continental's registration of the Illinois judgment in North Carolina was proper and (2) whether Continental improperly refused to mark the judgments partially satisfied and thus defamed plaintiffs' credit. Each of these issues will be discussed separately.

A. Registration of the Illinois Judgment

Continental obtained a judgment against the plaintiffs rendered by the United States District Court for the Northern District of Illinois on July 30, 1991. Continental Bank v. Everett, 760 F.Supp. 713 (N.D. Ill. 1991). The United States Court of Appeals for the Seventh Circuit affirmed the judgment on the merits and remanded the case solely for the computation of the amount of default interest and enforcement expenses. Continental Bank N.A. v. Everett, 964 F.2d 701 (7th Cur. 1992), cert. denied, 113 S. Ct. 816 (1992).

This judgment was registered in North Carolina in October, 1991. Plaintiffs challenged the registration of the judgment in North Carolina on the grounds that North Carolina statutory law was violated. In an opinion issued on April 28, 1992, Magistrate Judge Eliason held that the

registration was proper and he stated that "the Court rejects defendants' claim that Continental is not entitled to execution on the judgment because the judgment is not final or because it is otherwise not properly registered". Judge Bullock affirmed Magistrate Judge Eliason's opinion on June 5, 1992.

Continental claims that collateral estoppel and res judicata bar the relitigation of whether the Illinois judgment was properly registered in North Carolina. "Collateral estoppel bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had 'a full and fair opportunity' to litigate that issue in the earlier case." Combs v. Richardson, 838 F.2d 112, 114 (4th Cir. 1988). Collateral estoppel, "by avoiding duplicative relitigation of identical issues ensures that parties will eschew the piecemeal presentation of their case" thereby conserving judicial resources. Id. at 115.

Plaintiffs have submitted no evidence to indicate that they did not have a full and fair opportunity before Magistrate Judge Eliason to litigate whether the Illinois judgment was properly registered in North Carolina. Plaintiffs lost on the precise issue that they are now attempting to relitigate. Clearly, the issue the plaintiffs raise has been determined in a proceeding where they had an opportunity for a full and fair hearing. Thus, plaintiffs' claim is barred by the doctrine of collateral estoppel.

The doctrine of res judicata provides that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Kremer v. Chenical Construction Corp., 456 U.S. n. 461, 467 n.6 (1982). The Fourth Circuit stated:

> Res Judicata "is not a technical rule but a rule of 'fundamental and substantial justice' of public policy and private peace which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way."

Peugeot Motors of America, Inc. v. Eastern Auto Districutors, Inc., 892 F.2d 355, 359 (4th Cir. 1989), cert. denied, 497 U.S. 1005 892 F.2d 355, 359 (4th Cir.), cert. denoed, 497 U.S. 1005 (1991). In order to establish res judicata, three elements must be proven. There must have been "(1) a judgment on the merits in a prior suit resolving, (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action." Aliff v. Joy Mfg. Co., 914 F.2d 39, 42 (4th Cir. 1990).

In this present case, one of the issues plaintiffs rely upon is whether the Illinois judgment was properly registered in North Carolina. This same issue was raised by plaintiffs in an action against Continental that was decided by Magistrate Judge Eliason. It is clear that plaintiffs are att4empting to litigate the very issue previously decided by Magistrate Judge Eliason. Therefore, the Court finds that under the doctrine of res judicata the decision by Magistrate Judge Eliason, which was affirmed by Judge Bullock, also bars plaintiffs' claim.

B. Continental's Refusal to Mark the Judgments Partially Satisfied.

The second issue raised by plaintiffs is their claim that

Continental should have marked the judgment registered in North Carolina as being partially satisfied after Guilford made payments to reduce the amount of the debt. Plaintiffs made this same argument before Judge Nordberg in the Northern District of Illinois on July 9, 1992. Continental Bank, N.A. v. Everett, 90-C-1476 (July 9, 1992). While plaintiffs were requesting that Judge Nordberg require Continental to mark the judgments as being partially satisfied by payments made by Guilford, plaintiffs were simultaneously moving in Federal Court in North Carolina that Guilford be allowed to recover the very money for which plaintiffs were attempting to receive credit. Judge Nordberg stated that plaintiffs were "seeking to get credit for something that [they were] trying to get back" and they "can't have it both ways." Therefore, Judge Nordberg held that plaintiffs' action to compel Continental to mark the judgments as being partially satisfied was premature and would not be ripe until the North Carolina action to recover the money already paid by Guilford was concluded. Based on Judge Nordberg's ruling, Continental was under no obligation to mark plaintiffs' North Carolina judgments partially satisfied until Guilford's action to recover money already paid to Continental was resolved.

Guilford's action to recover the money paid to Continental was resolved on November 20, 1992 when this Court granted Continental's Motion to Dismiss Guilford's claim to recover money previously paid to Continental. According to Fed. R. App. P. (4)a, Guilford had thirty days in which to appeal the November 20 order. Therefore, the order dated November 20, 1992 did not become final until the expiration of tthei thirty day appeal period. Guilford did not appeal the November 20 order so the order became final on December 20, 1992.

North Carolina statutory law requires that notice of payment be included on a judgment within thirty days following written demand by the debtor. N.C.G.S. 1-239(c). On January 19, 1993, Continental filed in each court where the judgment was registered a Statement of Continental Bank on Credits Against Judgment which delineated the payments made on behalf of Guilford. These statements were filed within thirty days of the date on which the dismissal of Guilford's refund suit became final.

Judge Nordberg held that any judicial action to require Continental to mark the judgments partially paid was improper until the action to recover Guilford's payments was complete. The action by Guilford was complete and final on December 20, 1993. North Carolina law required Continental to file a astatement of payment within thirty days of written demand by plaintiffs. However, Plaintiffs could not have properly made a demand and still be in compliance with Judge Nordberg's order until December 20,. 1992. Continental filed a statement on credits against judgment within thirty days of the earliest possible date on which plaintiff could have properly demanded such a statement. Therefore, Continental's filing of the statements on January 19, 1993 was in accord with the instructions given by Judge Nordberg and within the time period required by North Carolina law. Thus, Continental acted properly and satisfied all legal obligations owed to plaintiffs with respect to filing of notices regarding payments made by Guilford.

C. Plaintiffs' Derivative Claims.

Plaintiffs made several claims that derive from the claims that are discussed above. Plaintiffs claim that Continental committed unfair and deceptive trade practices

under N.C.G.S. § 75-1.1 and committed intentional infliction of emotional distress. Both of these claims are a result of Continental registering their judgment in North Carolina and refusing to mark the judgments as partially satisfied until January 19, 1993. As discussed above, previous judicial decisions have held that all of Continental's actions were proper with respect to the judgments obtained against plaintiffs. Since Continental acted properly, there could be no unfair or deceptive trade practices and thus plaintiffs' claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 must be dismissed.

Plaintiffs claim that Continental engaged in a "course of conduct" that caused them emotional distress. However, all of the conduct alleged by plaintiffs was proper and in accord with previous court opinions. To succeed on a claim for intentional infliction of emotional distress, plaintiffs must allege conduct by defendant that is extreme and outrageous and that is intended to cause severe emotional distress. Waddle v. Sparks, 414 S.E.2d 22 (N.C. 1992). Plaintiffs fail to allege any behavior, other than behavior that has been approved by prior courts, that could possibly be so outrageous as to constitute intentional infliction of emotional distress. Thus, plaintiffs' claim for intentional infliction of emotional distress must be dismissed.

Continental moved in the alternative to transfer this action to Illinois. Since the entire action is resolved with this opinion and order, the motion to transfer will be denied. For the same reason, Continental's motion to stay will be denied.

IT IS THEREFORE ORDERED, that Continental's Motion to Dismiss be, and the same hereby is, **GRANTED**, that Continental's Motion to Transfer be, and the same hereby

is, **DENIED**, that Continental's Motion to Stay be, and the same is hereby is, **DENIED** and that this action be, and the same is, **DISMISSED** with prejudice.

s/s Hiram H. Ward

United States District Judge

January 12, 1994.

UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:

GUILFORD TELECASTERS, INC., trading and doing business as WGGT-TV,	Case No. B-86-02633
Debtor.	

ORDER IN AID OF CONSUMMATION

THIS CAUSE came on to be heard on January 3, 1992 before the undersigned United States Bankruptcy Judge on the motion ("Motion") of Guilford Telecasters, Inc. ("Debtor") and the proponents of its plan of reorganization for an Order in Aid of Consummation of the Debtor's substantially consummated plan of reorganization;

And the Court having reviewed and considered the Motion, and having heard statements of counsel for the Debtor, for the proponents, and for Continental Bank N.A. ("Continental"), now finds and concludes as follows:

1. The indebtedness of the Debtor to Continental has been paid in full by the Debtor pursuant to the terms of the confirmed plan of reorganization; provided, however, nothing herein shall impair or affect the rights of the parties in Continental Bank N.A. v. Robinson Everett, et al., Case No. 90-C-1746 for alleged claims, if any, for attorney's fees, litigation expenses and default interest.

2. Continental has not made application to this Court for its attorney fees and litigation expenses or for any interest computed at the default rate from the Debtor.

3. The Debtor has obtained a loan from SouthTrust Bank of North Carolina, N.A., and has made payment to Continental with the proceeds of such loan. The Debtor wishes Continental to assign SouthTrust certain collateral currently held by Continental, in order for the Debtor to collateralize the new loan from SouthTrust to the Debtor.

4. Continental should assign the collateral that it holds to SouthTrust, without recourse, warranty or representation, inasmuch as Continental has received payment of all principle and interest provided for under the Debtor's plan of reorganization. The assignment should be in the form of that assignment attached hereto as Exhibit A.

WHEREFORE, on the foregoing findings and conclusions, IT IS HEREBY ORDERED that Continental Bank N.A. make an assignment to SouthTrust in the form of the assignment attached as Exhibit A.

Dated: January 17, 1992

s/s James B. Wolfe, Jr.

James B. Wolfe, Jr.
Chief United States Bankruptcy
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CONTINENTAL BANK, N.A., Judgment Creditor	
v.	M-91-99
ROBINSON EVERETT, ET AL., Judgment Debtors	

ORDER

On December 19, 1991, this matter came before the Court on motion of defendants (also referred to as judgment debtors) Robinson Everett, Katherine Everett, and Jacob H. Froelich, Jr. to claim exemptions for property and fore hearing on defendants' request that the Court not accord full faith and credit to the registered judgment at this time.

Turning to the defendants' notice of defenses to the registration of the foreign judgment, they assert that the judgment is not final because the action in which the judgment was filed , i.e., Continental Bank N.A. v. Everett et al., 90-C-1446, is on appeal. In addition, at the hearing, counsel argued that the judgment was not final because other matters, such as attorney's fees or default interest had to be calculated. Next, defendants argue that in order to register a judgment in this Court, plaintiff (also referred to as judgment creditor) must follow the procedures set out in N.C.G.S. § 1-C-1703 by filing an affidavit certifying the finality of the judgment. Finally, defendants raise equitable grounds, stating that the plaintiff bank has acted precipitously and without

good cause and, therefore, a stay of execution should be entered.

The Court rejects defendants' claims that the judgment is not final because the matter is on appeal to the Seventh Circuit Court of Appeals. While prior to the 1988 amendments of 28 U.S.C. § 1963, a judgment creditor had to show the judgment had become final by reason of appeal or expiration of the time for appeal, such is no longer the case. The 1988 amendments added a proviso that a judgment may be registered in another United States district court not only when the judgment has become final, but also when ordered by the court that entered the judgment for good cause shown. This adds another basis for the registration of a foreign judgment, especially as in this case, where there has been no stay of execution on the judgment entered in the originating court. See In re Southern Indus. Banking Corp., 121 B.R. 229 (E.D. Tenn. 1990). In the instant case, the certified documents from the court in which the judgment originates shows that just such a good cause order was entered by the District Court for the Northern District of Illinois in this action.

The judgment debtors request that this Court ignore the finding of the District Court for the Northern District of Illinois and find that the judgment there has not become final in spite of an order from that court that the judgment is final. The Court does not intend to reexamine the findings of good cause. District courts are instructed not to issue orders which are directly conflicting with those issued by another district court. Feller v. Brock, 802 F.2d 722 (4th Cir. 1986). If circumstances have changed, the judgment debtors need to address that problem directly with the originating district court.

The defendants next argue that the judgment in the Northern District of Illinois is not a final judgment. They assert additional matters such as attorney's fees or default interest must be calculated. Again the Court does not understand why that matter should not be first addressed in the originating district. It would appear defendants are requesting this Court to enter an order directly conflicting with that from the originating district. In any event, it is not clear that matters, such as attorney's fees or additional interest, are not merely a legal issue collateral to the main cause of action which would not preclude the entry of a final judgment. See Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989 (5th Cir. 1986).

Next, the Court turns to defendants' request that this Court impose the state court procedure for registering a foreign judgment which is found in N.C.G.S. § 1C-1703. That procedure requires the filing of an affidavit certifying the finality of the judgment. The short answer to that assertion is that plaintiff is proceeding pursuant to 28 U.S.C. § 1963 which does not require such an affidavit. Rule 69 of the Federal Rules of Civil Procedure does not prescribe a contrary result. That rule covers enforcement of a judgment and not the registration of a foreign judgment.

Finally, the judgment debtors request that this Court stay the enforcement of a registered judgment, citing United States, etc. v. Home Indem. Co., 549 F.2d 10 (7th Cir. 1977). That case does hold that the provisions of Fed. R. Civ. P. 62 (f) apply to foreign judgments as well as original judgments originating out of the district court. Rule 62(f) provides that a federal district court may stay execution of judgment if the state laws in which the district court sits would provide for a stay of execution in a similar situation.

In addition, the Court may intervene in order to prevent or remedy a fraudulent act. Id.

The case as presented at this time does not present a situation permitting this Court to exercise such discretion. The judgment debtors fail to show that they are entitled to a stay of execution under state law. Nor have the judgment debtors shown that a fraud has been or is being practiced upon the Court. Furthermore, the hearing before this Court merely encompasses the judgment debtors' right to claim exemptions.

Therefore, the Court hereby denies the judgment debtors' request for a stay the proceedings in which they may claim exemptions. The Court further denies the judgment debtors' request for a stay of execution on the grounds submitted to the Court, but such denial is without prejudice.

Judgment debtor Katherine Everett failed to appear at the hearing. The Court granted her to and including 12:00 noon, December 20, 1991, within which to file her claims to exempt property. She did so. The judgment creditor has ten days from December 19, 1991 within which to object to Robinson Everett's and Jacob H. Foelich's schedule of exemptions and ten days from December 20, 1991 to object to Katherine Everett's schedule of exemptions. If no objections are filed, the Court will enter an order adopting the schedules submitted by the defendants as designating the property allowed by law and scheduled by the judgment debtors as exempt property. If an objection is filed, the Court will schedule a hearing to determine the value of property claimed by the judgment debtors to be exempt.

IT IS SO ORDERED.

s/s A. Eliason

United States Magistrate Judge

December 23, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CONTINENTAL BANK N.A.,	]	
Plaintiff,	]	
v.	]	2:91 NC 99
ROBINSON O. EVERETT, et al.,	]	
Defendants.	]	

ORDER

This matter comes before the Court on plaintiff's motion for an order permitting execution on a judgment rendered by the United States District Court for the Northern District of Illinois in favor of plaintiff Continental Bank. *Continental Bank v. Everett*, 90-C-1476 (N.D. Ill. July 30, 1991). That judgment was registered in this Court in October 1991. The Court previously denied defendants' motion to stay execution of proceedings and it set out defendants' exceptions as permitted and required under state law. Thereafter, plaintiff filed a motion for the Court to issue execution on the judgment in the sum of $69,591.82 plus interest from January 16, 1992 at $15.41 per day. The Court requested briefs and held a hearing on the matter on April 22, 1992.

Defendants oppose an order permitting Continental to execute on its judgment for a number of reasons. The first one is uncontested. Defendant Katherine R. Everett is now

deceased. Continental agrees that probate and estate law procedures must be followed before an order of execution may issue.

Defendants' next argument appears tom raise an issue already decided by the Court. Defendants argue that this Court may not permit execution on the judgment because it is not a final judgment as required by state law. See N.C.G.S. 1C-1702. This Court has already ruled in a December 23, 1991 Order that because plaintiff is proceeding pursuant to 28 U.S.C. §1993, this Court will follow federal procedures for registering a foreign judgment. It has already been determined that Continental's judgment is properly registered. Therefore, to the extent that the Court enforces the judgment using state law pursuant to Fed. R. Cia. P. 69, the Court finds any requirement under state law that the judgment be final shall be and has been resolved by referring to the federal procedures governed by 28 U.S.C. § 1963. Therefore the Court rejects defendants' claim that Continental is not entitled to execution on the judgment because the judgment is not final or because it is otherwise not properly registered.

Defendants object to enforcing the judgment for other reasons.

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[2]While not denominated as such, defendants' opposition, in reality, is tantamount to a motion made under Fed. R. Civ. P. 60(b). Such motions are best made in the district where the judgment originated, not in the district where it is registered. II Wright & Miller, Federal Practice and Procedure, § 2865, p. 423 (1973). In such a situation the registration court may decline to rule on the motion and require the party to proceed in the court which issued the judgment. Id. at 225. In the instant case, both parties have

[2] They complain that the judgment is not enforceable because payments have been made on principal and interest by the principal judgment debtor Guilford Telecasters, Inc. pursuant to a bankruptcy reorganization plan and order signed June 21, 1991. (The judgment debtors in the instant case are guarantors of that debt.) Plaintiff agrees so far. However, it seeks an additional amount, some seventy odd thousand dollars, in "default interest" which is additional interest over and above the regular interest due on the principal amount of the loan and which became due when the defendants dishonored their guarantees. Judge Bua determined this to have taken place on January 1, 1990. (See Exhibit 2 at p. 3, attached to pleading no. 29). Defendants argue that they should not have been assessed default interest by Judge Bua because Continental failed to seek those funds in the bankruptcy reorganization procedure involving Guilford Telecasters, Inc. Further, the Defendants challenge Continental's calculation of the repayment and whether the payments have been correctly applied and credited. Finally, defendants submitted an affidavit at the hearing from a James Thrash who states that a vice president of Continental Bank, a person named Lynn Simmons, misstated the balance due Continental from Guilford Telecasters, Inc. at an October 10, 1990 meeting of attorneys and shareholders and that this figure was relied upon by Guilford Telecasters, Inc. to its detriment in the reorganization proceeding.

In a response to the defendants' opposition, Continental Bank shows the Court that the bankruptcy court's order in the Guilford Telecasters, Inc. case expressly indicated that the reorganization plan of Guilford Telecasters, Inc. would not affect the liability of the defendant guarantors

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agreed to such a procedure.

in the instant case. (See Exhibit 1 to pleading no. 29). Furthermore, this fact was reemphasized in the court's order in aid of consummation of the plan entered on January 17, 1992 (Exhibit 6 to pleading no. 29). It is, therefore, clear that neither the reorganization plan nor the payment pursuant to the reorganization plan affects the judgment entered in the Northern District of Illinois.

It should be noted that the judgment in the Northern District of Illinois was entered after the bankruptcy plan was approved. To the extent the defendants now want to argue a waiver theory or estoppel theory based on some statement made by a Continental Bank vice president in an October 10, 1990 meeting, the Court holds that defendants should have raised those matters both in the bankruptcy reorganization proceeding in this District and in the Northern District of Illinois. The affidavit submitted by Mr. Thrash does not contain facts of any fraud which would be sufficient to grant relief pursuant to Fed. R. Civ. P. 60. That affidavit indicates that Ms. Simmons, at a later deposition, indicated that the figure used before the bankruptcy administrator on October 10, 1990 was in error. The defendants fail to show when they became aware of the true facts or that the bankruptcy court, in fact, relied on a false or fraudulent figure. Therefore, defendants' request that the Court deny or stay execution on theories of waiver or estoppel is denied. This denial is without prejudice to defendants raising the issue in the Fed. R. Civ. P. 60(b) motion in the Northern District of Illinois.

Next, defendants have presented a complaint filed in this Court by the defendants and a separate complaint filed by Guilford Telecasters, Inc. Both complaints name Continental Bank as a defendant and allege a variety of misconduct in

connection with the collection of the loan and judgment against them, including a claim that there has been overpayment. While the instant judgment enforcement proceeding need not concern itself with the various allegations of misconduct, it will take note of allegations concerning the miscalculation of the repayments made on the loan. Judge Bua, of the Northern District of Illinois, stated in his order that although the combined liability assigned to each of the three defendants exceeded the unpaid balance of the loan, nevertheless, Continental could not collect more than was actually due and owing to it. Plaintiff claims that it is owed some $70,000.00 in default interest which has not been paid. The defendants claim that Continental has been overpaid on its loan. Because of the peculiar nature of the judgment issuing from the Northern District of Illinois, the number of parties, and the way in which repayment was made, the Court finds that the matter cannot be resolved without some form of hearing or opportunity to present evidence. The reason for this is as follows.

Because of the peculiar nature of the guaranty, the judgment against the defendants set out a sum plus interest which could be collected from them. However, a reading of the underlying order establishing the judgment shows that these figures were merely caps or top figures which could be recovered from each of the defendants assuming that no payments were made by any other person. The loan amount due exceeded any single one of these "top figures." However, if, as is now the case, payments have been made, then it would be possible that the amount due on the loan would fall below the "top figures." This is what occurred and, thus, a new calculation needs to be conducted in order to determine the remaining amount which may be collected under the judgment against defendants.

As of now, plaintiff Continental Bank states that it is owed some $70,000.00. This figure is well under the cap for each of the defendants. In addition, attorney's fees and expenses have not been assessed in any post judgment proceeding in the Northern District of Illinois. Therefore, these defendants may owe amounts in addition to the $70,000.00. However, as plaintiff itself recognizes, at the present time, it is only entitled to execution on its judgment, at most, in the amount of $70,000.00+. Nevertheless, sine the defendants deny that this amount is owed, either because an overpayment has been made or because Judge Bua's judgment did not include default interest,
[3] a further proceeding must be conducted. Both sides have indicated a desire to have the matter resolved in the Northern District of Illinois. The Court agrees that is the better forum, especially since defendants claim that the judgment has been satisfied and does not cover default interest. See n.1, infra. The Court gave defendants to and including May 7, 1992 to file a petition in the Northern District of Illinois to request that court to determine the amount due. and owing, if any, on the judgment entered against them in Continental Bank v. Everett, 90-C-1476 (N.D. Ill. July 30, 1991), and that failing to so file a petition and offering proof of the same, this Court would order execution on the judgment based on the affidavit submitted by plaintiff in Exhibit 9 to its pleading 29. While

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[3] While it would appear that defendants would have a slim chance of prevailing on the contention that the judgment from the Northern District of Illinois failed to i nclude default interest, that matter need not and should not be resolved at this time. Both parties have indicated a desire to have the Northern District of Illinois calculate the amount on which execution may issue. It would be better if that Court interpreted its own orders.

a Rule 60(b) motion may normally be considered without leave by the appellate court, 11 Wright & Miller, Federal Practice and Procedure § 2873 (1973 & Supp. 1992), defendant shall take all necessary steps to further delay in having their motion considered.

IT IS THEREFORE ORDERED that the defendants' opposition to plaintiff Continental Bank's motion for an order permitting execution on the judgment is overruled, except for their various claims that the judgment has been satisfied.

IT IS FURTHER ORDERED that the defendants shall have to and including May 7, 1992 in which to file a petition or Fed. R. Civ. P. 60(b) motion in the Northern District of Illinois which shall at a minimum be accompanied by their factual evidence (affidavits, etc.) supporting their position that because there has been a miscalculation, the court should not accept the affidavit of Phillip F. Van Winkle, which was submitted as Exhibit 9 to plaintiff's pleading no. 29 filed in this action wherein Mr. Van Winkle states the amount due plaintiff from defendants for default interest to be $69,591.82 with interest beginning on January 16, 1992 in the amount of $15.41 per day which equalled the amount of $71,086.39 as of April 22, 1992.

IT IS FURTHER ORDERED that plaintiff Continental Bank's motion for the issuance of execution on the judgment in the amount stated in the preceding paragraph is hereby stayed pending the defendants' timely and good faith compliance with this Order in immediately proceeding to procure a ruling from the Northern District of Illinois concerning the actual amount now due and

owing on the judgment entered by the Court for purposes of execution on the judgment at this time.

s/s A. Eliason

United States Magistrate Judge

April 28, 1992

#3408

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge Judge Nordberg

Case Number 90 C 1476 Date: July 9, 1992

Case
Title Continental Bank, N.A. v. Robinson Everett, Kathrine Everett, and J. H. Froelich

MOTION

Defendants' Supplemental Motion Under Rule 60(b)

Docket Entry

(1) x Filed motion of June hearing in 'MOTION' (see above)
(2)
(3)
(4)
(5)
(6)
(7)
(8)
(9)

(10) x (Other docket entry) Hearing Held on defendants' supplemental motion under Rule 60(b) .... Per oral ruling, defendants' supplemental motion is denied.
(11)
x No notices required, advised in open court.

July 14, 1992

Date /Time received in Clerk's Office

2:21

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CONTINENTAL BANK, N.A., Plaintiff,	No. 90 C 1476
v.	Chicago, Illinois
	July 9, 1992
	9:30 a.m.
ROBINSON EVERETT, et al., Defendants.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiff: MR. ANDREW S. MAROVITZ

For the Defendants: MR. JEFFREY C. BLUMENTHAL

MICHAEL P. SNYDER, CSR, RPR, CM
Official Reporter
United States District Court
219 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone (312) 435-5563

THE CLERK: Case 90 C 1476, Continental Bank versus Everett; defendants' supplemental motion under Rule 60(b).

MR. BLUMENTHAL: Good morning.

THE COURT: Good morning

MR. BLUMENTHAL: Good morning, Your Honor. Jeffrey C. Blumenthal on behalf of defendants.

This is defendants' supplemental Rule 60(b) motion seeking the entry of an order that the amounts due from defendants pursuant to the July 26th -- excuse me -- July 22nd, 1991, summary judgment have been paid and satisfied and that the only amounts defendants remain liable for is $71,578.52 in default interest, per diem on that amount, and attorneys fees and costs to be determined by the Court.

THE COURT: All right.

MR. MAROVITZ: Good morning, Your Honor.

THE COURT: On behalf of?

MR. MAROVITZ: I am Andy Marovitz on behalf of the plaintiff Continental Bank.

THE COURT: Right, and you have filed -- Eileen I think you have got that there -- the bank's response?

MR. MAROVITZ: We did, Your Honor. We received service of this motion on Tuesday.

THE COURT: I have had a chance to read through

both, and I would just ask counsel for the defendants now, how do you answer the argument that you have got to elect, you can't have it both ways, you can't in the one position take a position in court that the payment has not been properly made and should be returned so there would be no payment made and then seek to get a court order giving you full credit for having made that very same payment? Aren't you taking inconsistent positions?

MR. BLUMENTHAL: I don't think so, Your Honor. I'm not involved in the North Carolina action, nor is my firm.

THE COURT: Well, your client is.

MR. BLUMENTHAL: But my understanding is that in that action, what is being sought is --

THE COURT: Return of the money.

MR. BLUMENTHAL: -- overpayment. To the extent that amounts have been overpaid, the bank is not entitled to those amounts, plus I think they are seeking moneys for tortious conduct. Your Honor, three and a half million dollars more have been paid. The amount outstanding at this time is 71,500-some dollars and attorneys fees not yet determined. Your Honor, if there has been an overpayment, the bank isn't entitled to that money. They cannot be harmed.

THE COURT: I'm not suggesting that you can't proceed with that litigation, but it seems to me you can't have it both ways.

MR. BLUMENTHAL: I don't think --

THE COURT: You can't take inconsistent positions.

MR. BLUMENTHAL: They are not. How is it --

THE COURT: What do you mean it is not inconsistent? You want full credit for money that you are trying to get back. I mean, you can't have it both ways.

MR. BLUMENTHAL: Your Honor, there have been judgments that --

THE COURT: This is a premature motion that has been filed here.

MR. BLUMENTHAL: Your Honor --

THE COURT: It is premature. It has not been finally decided whether Guilford made any payment or not, or, if so, what the amount of the payment was.

MR. BLUMENTHAL: I think it has. Guilford has made over three and a half million dollars worth of payments. Your Honor --

THE COURT: That is fine.

MR. BLUMENTHAL: If there has been an overpayment, how can the bank --

THE COURT: It is not this Court's responsibility to pass in advance on a pending litigation in North Carolina.

MR. BLUMENTHAL: But we are not asking the Court to do that.

THE COURT: It is really inappropriate for us to be involved in that at this point, and I am going to deny your motion under Rule 60(b) on the basis that it is premature since you are seeking the recovery of the very money that you want to get credit for and the satisfaction of judgment, and once that case is resolved, so we know what the actual payment was, obviously you are entitled to credit for that payment. If you are seeking -- if there also is involved in your motion the idea that the bankruptcy court, by reorganization, affects the obligations of the guarantor, you know that you are running into a long line of cases that does not support that.

MR. BLUMENTHAL: Your Honor, if the principal debt has been paid, Your Honor, then it doesn't matter who paid it. We are the guarantors of the --

THE COURT: You --

MR. BLUMENTHAL: Could I address it in a memo, Your Honor?

THE COURT: You have already addressed it. We have had more than enough information presented to the Court, but the fact is that you are seeking to get credit for something that you are trying to get back. You can't have it both ways. It is premature because we don't know yet what amount of the payment that Gilford Telecasters made is going to remain with the bank and what part the bank might have to refund, and is so, then any court order at this time in satisfaction would be misleading and could create other problems, people relying on something that turned out not to be accurate. So it is premature. We don't know yet what payment Guilford Telecaster has finally made, and once that

is done, whether this is the appropriate court or whether the North Carolina court is the appropriate court, somebody will give appropriate satisfaction, a judgment for the amount that finally remains paid.

I don't know if there is any need to take any additional time. You have both filed and presented your positions well, I have read it, and that's the order. I deny the motion or supplemental motion under Rule 60(b) on the basis that it is premature for the reasons indicated.

Thank you very much.

MR. MAROVITZ: Thank you very much, Your Honor.

(Proceedings concluded.)

CERTIFICATE

I, Michael P. Snyder, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable JOHN A. NORDBERG, one of the judges of said Court, at Chicago, Illinois, on July 9, 1992.

s/s Michael P. Snyder

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2979
Continental Bank, N.A.,

Plaintiff-Appellee,

v.

Robinson O. Everett, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 1476--Nicholas J. Bua, Judge.

Argued April 13, 1992--Decided May 21, 1992

Before Cudahy, Easterbrook, and Kanne, Circuit Judges.

EASTERBROOK, Circuit Judge, Guilford Telecasters, Inc., which operates WGGT-TV in Greensboro, North Carolina, borrowed $4.2 million from Continental Bank in 1984. Continental obtained guarantees from the firm's stockholders, each of whom is jointly and severally liable up to a limit based on his proportional ownership of the stock. Robinson Everett and the estate of Kathrine Everett, his mother, own 65% of the stock between them. Each

guaranteed roughly $1.6 million of Guilford's debt. J.H. Froelich, who owns a smaller bloc, guaranteed about $545,000 of the debt. Other investors assumed proportional obligations.

Guilford encountered cash flow problems and in 1986 filed a bankruptcy petition. Continental, which had a security interest in Guilford's receivables consented to their use in operating the business, if Guilford remained current on the loan--which it did, until May 1987. Then the guarantors took over, in order to fulfill the condition on which Guilford had access to cash. During 1989 the guarantors and Continental reached a pass over two topics. First, Continental insisted that the guarantors pay according to the schedule negotiated before bankruptcy, under which the payments increase with time to retire additional principal. The guarantors insisted that they had to pay only the amount due each month when the bankruptcy began. Second, Continental as creditor voted against the plan of reorganization proposed by the debtor and supported by guarantors in their roles as its investors and managers. (Robinson Everett, a professor of law who was at the time the Chief Judge of the United States Court of Military Appeals, was not a manager of the TV station but took an active role as an investor.) At the beginning of 1990 the guarantors stopped paying. Continental responded with this diversity action. All guarantors except Froelich and the two Everetts paid up. From now on, we refer to these three collectively as "the guarantors."

Initially the guarantors attempted to persuade the district judge that the court lacked personal jurisdiction over them. The judge disagreed, holding that by guaranteeing a loan with a Chicago bank, promising to [pay in Illinois, agreeing that any dispute would be resolved under the law of

Illinois, and so on, the defendants were doing business in Illinois for purposes of Ill. Rev. Stat. ch. 110 ¶2-209(a)(1). 742 F.Supp. 508 (N.D. Ill. 1990). Next the Court granted summary judgment for the Bank, 760 F. Supp. 713 (1991), and finally determined the sums remaining to be paid on the guarantees, 768 F. Supp. 246 (1991). Meanwhile the bankruptcy judge confirmed Guilford's plan of reorganization, cramming the plan down an objecting Continental's throat after finding that the Bank would be paid in full. *In re Guilford Telecasters, Inc.*, 128 B.R. 622 (Bankr. M.D. N.C. 1991). Guilford has since paid principal and interest--but not in full. It did not pay the penalty interest that the Bank has claimed from the guarantors on account of the default in January 1990. This sum of approximately $75,000, plus legal fees the Bank has incurred pursuing the guarantors, are the remaining stakes.

Appellate jurisdiction is the first topic. The guarantees entitle the Bank to recover the attorneys' fees incurred in the course of collection. The fees are substantial, exceeding $400,000, as the guarantors have fired off a fusillade of defenses. The district court entered judgment on the guarantees but put off determining the precise amount payable as fees. An open issue about legal fees, contractual or otherwise, does not affect our jurisdiction to resolve the appeal on the guarantees of the principal and interest. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196(1988) (merits and fees appealable separately); *Buggs v. Elgin, Joliet & Eastern Ry.*, 852 F.2d 318, 321 n.3 (7th Cir. 1988) (failure to quantify award of fees does not prevent appeal on the merits); *Exchange National Bank v. Daniels*, 763 F.2d 286 (7th Cir. 1985) (fees due under contract and those required by law are treated the same for purposes of appellate jurisdiction). Contra, *Justine realty Co. v. American National*

Can Co., 945 F.2d 1044 (8th Cir. 1991) (when fees are provided by contract, judgment on the merits is not appealable until fees have been quantified).

Next comes personal jurisdiction. The district court concluded that the entire course of dealings amounted to "transaction of any business within" Illinois. Ill. Rev. Stat. ch. 110 ¶2-209(a)(1). Whether the court's understanding of "business" is correct does not matter. Later in 1989, before the Bank commenced this suit, Illinois amended its long-arm statute to assert personal jurisdiction over those who participate in "[t]he making or performance of any contract or promise substantially connected with this State", ¶2-209(a)(1). The loan and guarantees are "substantially connected with" Illinois-the documents recite that they were delivered and executed in Illinois, the loan was to be repaid in Illinois, and the guarantors agreed that Illinois law would govern. These same considerations show that personal jurisdiction is consistent with the due process clause of the fourteenth amendment. *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 283-84 (7th Cir. 1990); *Madison Consulting Group v. South Carolina*, 752 F.2d 1193 (7th Cir. 1985); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971).

On to the merits. All of the guarantors' defenses (and mirror-image counterclaims) are variations on the theme that the Bank left the loan undersecured, exposing the guarantors to more risk than they anticipated. Continental's obligation to Guilford was contingent on Guilford's providing the Bank with security interests in, among other things, its broadcasting license and its leased broadcasting facilities. Continental funded the loan without obtaining a security interest in the license, having concluded that such an interest is legally

impossible. And although Guilford took the steps necessary to grant a security interest in its leaseholds, the Bank failed to perfect that interest. The Bank obtained an interest in Guilford's receivables and other assets, but the guarantors say this is insufficient, that the Bank's taking the full security was essential for their protection. They add that the Bank defrauded them by not revealing what it knew and they did not: that because a broadcast license is not property, 47 U.S.C. §301, and may not be assigned or transferred without the FCC's permission, 47 U.S.C. §301(d), the license itself is not a store of value on which the Bank could levy. *Stephens Industries, Inc. v. McClung,* 789 F.2d 386, 390-91 (6th Cir. 1986); *In re Merkley,* 94 F.C.C.2d 829 (1983). Cf. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 25-40 (1959).

Although the guarantors argue that the Bank defrauded them, that effective security was a condition precedent to the effectiveness of the loan and guarantees, and that the Bank impaired the value of the collateral, these amount to the same thing, and we treat the position as one argument. Professor Everett, arguing on behalf of all three guarantors, conceded that he had not found a case in Illinois (or any other jurisdiction) requiring a lender to reveal to a guarantor the value of the borrower's assets as collateral. No surprise. It amounts to saying that a potential debt investor in a firm (which a bank is) owes a duty of care, perhaps even a duty of loyalty, to the existing equity investors (which Guilford's guarantors are), given the possibility of subrogation, see *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1194-97 (7th Cir. 1989)). That is unheard-of in either corporate or banking law. A bank making a commercial loan depends largely on the success of the business for repayment. The firm has the best information about its business and prospects

and accordingly may be obliged to disclose some details to the bank and guarantors. Even that duty is attenuated, for persons negotiating for a contract usually may keep valuable information to themselves. They may not lie, but they need not volunteer. The ability to capitalize on private information is an important goad to create that knowledge, which may be important in matching assets with their more productive use. See generally E. Allan Farnsworth, 1 *Contracts* § 4.11 at 406-10 (1990), and Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts,* 7 J. Legal Stud. 1 (1978), both of whom collect and analyze the cases. Bank's self-interest leads them to nose out the value of collateral; if they do not, they are apt to suffer loss. Borrowers and guarantors have their own reasons to know the value of assets. None acts as fiduciary of another. *Farmer City State Bank v. Guingrich,* 139 Ill. App. 3d 416, 423, 487 N.E.2d 758, 763 (4th Dist. 1985).

The general principle that parties to arms' length negotiations need not open their files to each other is especially apt here, because the bit of information the guarantors wanted Continental to reveal--that it could not obtain a security interest in a broadcast license--is both public and irrelevant. It is public because it is a legal conclusion, having nothing to do with the facts peculiar to WGGT-TV or information buried in Continental's vaults. One side in negotiations need not disclose the United States Code to the other; the statutes, regulations, and cases are available to all. Like other states, Illinois takes the position that failure to disclose the law cannot be foundation for redress. E.g. *Aurora v. Green,* 126 Ill. App. 3d 684, 688, 467 N.E.2d 610, 613 (2d Dist. 1984); *Hamming v. Murphy,* 83 Ill. App. 3d 1130, 1135, 404 N.E.2d 1026, 1030 (2d Dist. 1980). So, too, Illinois expects guarantors to inquire into risks. St.

Charles National Bank v. Ford, 39 Ill. App. 3d 291, 295, 349 N.E.2d 430, 434 (2d Dist. 1976). If Guilford and the guarantors wanted to know whether a broadcast license may be used as collateral, they had only to ask their own lawyer. McLean County Bank v. Brokaw, 119 Ill. 2d 405, 417, 519 N.E.2d 453, 458 (1988). Not surprisingly they had counsel to advise them about the intricacies of communications law. If as the guarantors now say the use of a license as collateral is a debatable issue, so that their lawyer's views were unreliable, it is all the more reason why Continental cannot be accused of "fraud" for failing to "reveal," as if it were a fact, its view of the law. But the whole subject is irrelevant. A broadcast license is not a tangible asset. It can't be melted down, sold as scrap, or packed up and sent to Alaska. Its value lies in access to a given frequency in a specific place, which yields time that may be sold by the minute to advertisers. The value of the license to Guilford lay in the income stream from those advertisers. Continental wanted, and got, a security interest in that income, which it could enjoy while Guilford remained the owner of the license and operator of WGGT-TV. What more would it have had with a security interest in the license? An ability to sell the license to someone able to extract greater revenues is not much different from the ability to replace Guilford's managers in the bankruptcy. This makes it hard to see how the Bank's failure to reveal 47 U.S.C. §301 to the guarantors did them injury.

In the end the parties' rights are fixed by their contracts, which contain three dispositive provisions. First, they say that the security is for the benefit of the lender, not of the borrowers or guarantors. Second, they provide that the "Bank shall have no duty as to the collection or protection of the Collateral or any part thereof or any income thereon, or

as to the preservation of any rights pertaining thereto, beyond the safe custody of any Collateral actually in the Bank's possession." Third, the guarantors "expressly waive"...all diligence in collection or protection of or realization upon...any security for" the loan to Guilford, and permit the Bank to "release...any property securing" the loan without notice to them. It could hardly be clearer that the lender is free to do what it wants with the collateral. 760 F. Supp. at 719. Illinois enforces clauses of this kind, which are fatal to the guarantors' position. *Lawndale Steele Co. v. Appel,* 98 Ill. App. 3d 167, 172, 423 N.E.2d 957, 961 (2d Dist. 1981); *Ishak v. Elgin National Bank,* 48 Ill. App. 3d 614, 617-18, 363 N.E.2d 159, 161-62 (2d Dist. 1977); see also *FDIC v. Nanula,* 898 F.2d 545, 550 (7th Cir. 1990) (Illinois law). Guarantors may elect to rely on the lender's attention to its own interests as their best protection, preferring market incentives over legal remedies and receiving lower interest rates in exchange.

The guarantors rely on cases such as *Langeveld v. L.R.Z.H. Corp.,* 74 N.J. 45, 376 A.2d 931 (1977), and *First Citizens Bank & Trust Co. v. Sherman's Estate,* 250 App. Div. 339, 294 N.Y.S. 131 (1937), in which the contracts were silent, and the courts concluded that in the absence of agreement the bank had to maximize its realization on the collateral to reduce the guarantor's risk. Judicial attempts to draft standby terms that will govern when the parties neglect to address the subject are just guesses about what the parties would prefer. When the contracting parties draw up their own provisions, courts enforce them. People write things down in order to assign duties and allocate risks--functions vital to economic life yet defeated if courts prefer hypothetical bargains over real ones or use the ambiguities present in all languages to frustrate the achievement of certainty. Cf.

Concast, Inc. v. AMCA Systems, Inc., No. 91-2179 (7th Cir. Mar. 10, 1992).

What about the requirement of good faith that is part of every contract? The guarantors say that they are entitled to a jury trial to determine whether the Bank acted throughout in good faith. Once again, the guarantors misunderstand how courts use such principles. The Uniform Commercial Code defines good faith as honesty in fact. UCC §1-201(19). See also 2 *Farnsworth on Contracts* at §7.17a; Robert S. Summers, *"Good Faith" in General Contract law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968). Beyond that, and the obligation to be prudent in the exercise of discretion conferred by contract, see *Capital Options Investments, Inc. v. Goldberg Brothers Commodities, Inc.*, 958 F.2d 186, 189 (7th Cir. 1992) (Illinois law), good faith is another way to describe the effort to devise terms to fill contractual gaps. *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 435-36, 438-39 (7th Cir. 1987) (Illinois law); *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984). As a method to fill gaps, it has little to do with the formation of contracts (a point *Frey* stresses, 941 F.2d at 595, but that the guarantors, despite their heavy reliance on *Frey*, ignore) and nothing to do with the enforcement of terms actually negotiated. Because this duty is an estimate of "what parties would agree to if they dickered about the subject explicitly, parties may contract with greater specificity for other arrangements." *Jordan*, 815 F.2d at 436. Our guarantors negotiated with the Bank and agreed to language establishing precisely what duties Continental would have with respect to security: it must safeguard collateral in its possession but has no other obligations. Gap-filling methods such as good faith

do not "block use of terms that actually appear in the contract". *Kham & Nates Shoes No. 2, Inc. v. Bank of Whiting,* 908 F. 2d 1351, 1357 (7th Cir. 1990). Accord, *Capital Options,* 958 F. 2d at 190-91. The guarantors released Continental from any obligation to use the collateral for *their* benefit. The guarantors may rue their decision but cannot escape it.

At last to the remedy. The parties debated in the district court how to determine the maximum obligation of each guarantor. Under the contracts, payments were to be credited against the caps but interest was to be deducted. Continental and the guarantors contested how to account for the simultaneous payments and running of interest between May 1987 and December 1989. None of this matters anymore, for both the penalty interest and liability for attorney's fees come on top of the cap.

Over the guarantors' protest, the district court declined to determine the amount of Guilford's outstanding liability, observing that because that liability exceeded any of the three guarantors' obligations, the precise figures did not matter. Time has overtaken this assessment. The bankruptcy judge in North Carolina determined the amount Guilford owed. 128 B.R. at 628. Because the district court must now determine the sum due as attorneys' fees, it is prudent for the court simultaneously to fix the amount of penalty interest and enter a single judgment, on which the guarantors will be jointly and severally liable. We remand the case for that purpose.

Only the amount of fees and penalty interest remains in contention. The district court held, 768 F. Supp. at 247 n.4, that penalty interest is due from January 1, 1990, when

the defendants dishonored their guarantees. The guarantors did not present this as an issue on appeal separate from their main argument that they owe nothing. Any additional arguments they may have, they have waived. And it should go without saying that the computation of legal fees and costs is not an occasion to reopen any of the substantive issues that we have resolved, or passed in silence as requiring no separate discussion.

AFFIRMED AND REMANDED

A true Copy:
Teste:

_____
Clerk of the United States Court of
Appeals for the Seventh Circuit